Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	**)**	
Technological Transition of the Nation's	**)**	**GN Docket No. 12-353**
Communications Infrastructure	**)**	

REPLY COMMENTS OF THE CONSUMER FEDERATION OF AMERICA

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Commenters

The Consumer Federation of America is pleased to submit these comments in response to the Public Notice in the above captioned proceeding. The Consumer Federation of America (CFA) is an association of non-profit consumer organizations that was established in 1968 to advance the consumer interest through research, advocacy, and education. Today, nearly 300 of these groups participate in CFA and govern it through their representatives on the organization's Board of Directors and the annual Consumer Assembly.

CFA has been involved in communications, media and Internet policy for decades in legislative, regulatory and judicial arenas and has advanced the consumer view in policy and academic publications. Appendix A presents a selection of citations to comments filed at the Federal Communications Commission and academic articles and papers published by CFA and its staff over the past thirty years that address the public service principles discussed in these comments.

Approach and Recommendations

As the Internet and its powerful communications protocols (Internet Protocols, IP) come to dominate communications, the telecommunications carriers who own and operate the 20th century

public switched telephone network (PSTN) have requested that the old network be retired and they be allowed to migrate the network to an all IP approach. The resulting "sun setting" the PSTN raises vital questions about the public service principles that guided the extremely successful deployment of the PSTN and the obligations that were placed on the telecommunications carriers to serve the public in specific ways.

In order to properly address the question of whether and how the public service principles should apply in the future, it is necessary to understand the long history and purpose of those principles, as well as the specific legal obligations that attached to communications carriers that deliver telecommunications service. The examination of that history makes it clear that the public service principles that governed the telecommunications network throughout the 20th century contributed mightily to its success and should be preserved and expanded in the 21st century.

While the telecommunications carriers are quite correct in seeking to sunset the PSTN, the long sweep of history and the 1996 Telecommunications Act make it clear that the half dozen principles that have come to constitute the public service obligations of communications carriers should be preserved. As the PSTN is transformed into the public digital communications network (PCDN) the old technology may sunset, but the fundamental values should not. Thus, we reject the claim that the public service principles are antiquated, obsolete hindrances to progress. On the contrary, they are fundamental values; tried and true guideposts that ensure progress in a long march to economic and political freedom.

These comments briefly summarize the attached paper, entitled *The Long History and Increasing Importance of Public Service Principles for 21st Century Digital Communications.* The paper presents a detailed historical, economic, policy and legal analysis that shows the public service principles in the Act should be extended to 21st century telecommunications.

The long history of public service obligation demonstrates their increasing importance in the 21st Century Communications Sector

Public service principles that govern activities that are "affected with the public interest," have a very long history in Anglo American law and U.S. practice. Brought by the earliest settlers to North America, this legacy was fertilized by uniquely American ideas – the U.S. Constitution and the vibrant tradition of federalism – to grow into the cornerstone of a progressive, democratic communications model.

Section I of the paper reviews the history of the expanding public service principles applied to the transportation and communications sectors. The analysis highlights the fact that a steadily progressive expansion of the public service principles has taken place throughout U.S. history. As the economy grew and society changed the principles became broader and more complex. The important and expanding role of telecommunications in the economic, social and political life of 21st century society strongly supports the policy conclusion that the public service principles should be affirmed and strengthened.

- The basic principle that certain activities are "affected with the public interest" stretches back almost 600 years to the early renaissance and the birth of capitalism. The legal obligation to provide nondiscriminatory access to the vital services associated with the means of transportation and communications under Anglo Saxon common law was well articulated by the 17th century.
- As the industrial revolutions of the 19th and 20th centuries transformed the economy and society, the need for public service principles expanded and the mechanism to enforce them changed.

The specific statutory building blocks on which the current public service principles stand were put in place almost exactly a hundred years ago, when the obligation of network integration (interconnection and interoperability) was established.

- The Mann-Elkins Act of 1910, which extended the Interstate Commerce Act (1887) to telecommunications, placed interstate telecommunications provided by private companies under the jurisdiction of a federal agency with a clear mandate for nondiscriminatory access.

- Soon thereafter, a 1914 consent decree entered into by the U.S. Department of Justice, required AT&T to integrate (interconnect and interoperate on terms of equal access) with independent telephone companies. This has been an essential characteristic of the telecommunications network since.
- Public safety was added in the Radio Acts (1912, 1927).
- Universal service and consumer protection were made explicit with the Communications Act (1934) of the New Deal, which also consolidated the public service principles in the mission of a single agency (the Federal Communications Commission).
- Innovation at the edge as a public service principle was added by regulatory proceedings at the Federal Communications Commission (Carterphone, 1968, the Computer Inquiry, 1968 and unlicensed radio spread spectrum, 1985). This principle was embraced by Congress in the 1996 Telecommunications Act.

Enforceable, *Ex Ante* obligation are necessary to promote the public service principles in the digital age, flexible, multi-stakeholder process are best suited to implement them in the digital age

Having demonstrated the importance of preserving and strengthening the public service principles that should govern the 21st century communications space on the basis of the historical record, Section II of the paper reviews the same historical record for insight into how the principles should be implemented. That record shows that as the infrastructure networks evolve, the substance and enforcement mechanism of the public service principles have evolved, as well. The analysis rejects the two most frequently offered approaches to implementing the public service principles as poor choices.

- Reliance on the market alone to take care of the principles is unacceptable because ubiquitous, seamless, nondiscriminatory access to integrated infrastructure networks is not an outcome that one can expect from infrastructure network industries in a number of areas, including communications markets.
- Command and control regulation, the dominant approach to promoting the public service principles in the 20th century, is ill-suited to achieve the goal in the digital communications space because it is rigid and slow, antithetical to the dynamic, diverse communications that innovation at the edge produces.

Fortunately, the digital revolution that has transformed the communications space has also produced the building blocks of an alternative communications model. It has already provided two

remarkably successful examples – the Internet protocol and Wi-Fi communications using unlicensed spectrum. These two revolutionary communications protocols required a new combination of public and private action to create a space for economic and political freedom between the market and the state.

- It is only because the state made and enforced critically important decisions to keep the space free from meddling by both regulators and communications carriers that innovation and entrepreneurship could thrive.
- The new entrants, innovators and entrepreneurs adopted open standards and multi-stakeholder processes to govern the new space.
- Incumbent infrastructure network operators have repeatedly failed to embrace open standards and resist integration.

The Carterphone and the Computer Inquiries in the late 1960s ensured that nondiscriminatory access to the telecommunications network would extend to the flow of data and that innovation in customer premise equipment could flourish. The dominant incumbent telecommunications carrier despised the idea of a decentralized communications protocol and would have quickly throttled it by denying access had they been allowed to. Without decisive public policy action by the FCC, the telecommunications companies might have defeated decentralized communications altogether, certainly would have slowed its development down and probably would have distorted its growth, if only by forcing the government to regulate the space more intensely. The voluntary action of the developers of the new communications protocol to fill the space opened by government action was a key ingredient for success. The social institutions they developed and used to manage the decentralized network for thirty years deserve close study and deference as candidates for the future governance structure of the communications network. Carterphone and the Computer Inquiries must be seen as the origin and foundation for a significant advance in the thrust of public policy with respect to the communications network. They introduce the possibility for innovation at the edge of the network as a primary driver of economic activity.

The spread spectrum rulemaking adopted by the FCC to allow everyone and anyone to have access to radio frequencies, which had been considered garbage by the commercial users of the public airwaves, subject to simple rules of use, had a similar effect. It ensured access to an irreplaceable, raw communications resource in the most deregulatory, free market approach imaginable, unlicensed, universal access. The private sector concluded, to its credit, that a common communications protocol would expand the market and the best approach was to create voluntary institutions to adopt and defend those standards.

In both cases, the rules were structured in such a way that the government did not have to get involved in the day-to-day regulation of behavior. In both cases, because of the deregulatory age in which these decisions were made, the presumption was shifted in favor of the freedom to act. The incumbent network operators had to show that devices would harm the network, or data traffic should not be allowed to flow, which they rarely, if ever were able to show.

For three decades encompassing the birth, childhood and adolescence of the digital revolution, Internet traffic flowed freely over the telecommunications network under the Computer Inquiries to devices that were made possible by the Carter phone decision.

The model worked precisely because it was located between the market and the state. The state used its power to create a space that was free from the worst instincts of both the market and the state, and the private actors who wanted to enter that space realized that they needed to regulate themselves in a manner consistent with the principle of nondiscrimination, which they equated with interoperability.

The Communication Act providers clear legal authority on which the Federal Communications Commission can build a framework for the public service principles to govern advanced telecommunications services in the 21st century

Section III of the attached paper examines the question of how the FCC can construct and expand ther new framework for public service principles in the digital communications space from

within the current legal structure. Congress could always enact a new law, but most observers seem to think the prospects for that are dim. Having testified as early as 1982 on issues and in proceedings that would be considered to be in the direct history of the Telecommunications Act of 1996, we believe most observers are too optimistic. Fortunately, the legal framework that governs the public service principles of the PSTN under the 1996 Telecommunication Act is adequate to the task at hand.

In the 1996 amendments to the Communications Act, the Congress clearly intended for the public service principles of the public switched telephone network to apply to advanced telecommunications services.

- It explicitly defined telecommunications "regardless of the facilities used."
- It declared that universal service was an evolving concept that applied to information and advanced telecommunications services.
- It identified the specific conditions that were necessary to extend the definition.

The deregulatory aspiration of the Act was reconciled with the affirmation and expansion of public service obligations by laying out a new process in Section 10 that allowed the Commission

- to forbear from implementing rules that are no longer "necessary in the public interest,"
- stating the specific conditions that the Commission must find to conclude that regulation is no longer necessary.

Because the Commission failed to use the approach outlined by Congress in its initial consideration of one of the principle (nondiscriminatory access), the Commission failed to exercise it proper role in promoting the goals of the Act. The Commission failed

- to assess the impact of its decision on the wide range of public service goals it was charged with accomplishing,
- failed to conduct a proper forbearance proceeding in classifying highs speed data transmission as an information service, and
- has struggled to reconcile the public service goals of the Act with the ill-considered classification of high speed data transmission, cobbling together a series of *ad hoc* rules to attempt to implement the intent of Congress.

The definitional exercises in which the FCC engaged not only failed to follow the process outlined by the Congress, the proceedings were highly contentious and have proven to be inaccurate at analyzing critical elements that were central to its conclusion. In the highly speculative definitional proceedings, the FCC proved to be particularly inept at

- characterizing technological relationships,
- predicting technological developments,
- describing consumer behavior and
- identifying competitive trends.

The Commission decision to classify high speed data transmission as an information service not only failed to follow the process outline by the Congress, the Commission

- reversed long standing precedent regarding how services should be classified, and
- assumed that it would still have the authority to implement the public interest goals of the Act based on a long standing legal interpretation that it could use "ancillary authority" under Title I to achieve goals that are contained in other Titles of the Act.

It was evident from the beginning that the "administrative" repeal of Title II threatened to undermine the public service principles that Congress clearly intended to apply to telecommunications and advanced telecommunications service.

- The FCC has struggled to deal with the other public service principles it did not consider in its initial decision.
- This threat became more palpable when an adverse ruling by the D.C. Appeals called the assumption of FCC authority into question for the one public service principle it directly addressed.

Combining the clear intent of Congress, the compelling case for preservation of the public service principles, and the legal weight of a full and thorough evaluation of all the public service principles, affirmation of FCC authority must be the first step to developing an effective approach to ensuring and advancing the public service principles in the 21st century as Congress intended, is to

affirm that the Federal Communications Commission has the authority to implement those principles.

- The misclassification of high speed data transmission as an information service should be corrected.
- With authority established, the FCC can then determine under the forbearance procedure which specific rules are no longer necessary in the public interest.

If the D.C. Circuit upholds the FCC's Open Internet Order, which would affirm its authority over nondiscriminatory interconnection and interoperability via Title I authority that is ancillary to the other Titles in the Act, the FCC should assert Title II authority to implement the other public service principles. The Orders in the Computer Inquiries, which play a vital role in creating the conditions for the birth and growth of the Internet, were rested on ancillary authority, while the other public service principles were enforced under Title II and Title III authority. Thus, relying on ancillary authority for some rules and direct authority for others would restore the situation that existed for over 35 years, a situation that the Congress showed no intent to alter in the 1996 amendment to the Communications Act.